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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1599

WILMA L. KIRTLEY,
Petitioner,
VERSUS
CLYDE L. BICKERSTAFF, District Director of Internal Revenue, and THE UNITED STATES OF AMERICA, by serving William R. Burkett, U. S. Federal District Attorney,
Respondent,
and

No. _____

JOSEPHINE SCOTT,
Petitioner,
VERSUS
WILLIAM H. THOMPKINS, Acting District Director of Internal Revenue Service, and THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above causes on the 6th day of December, 1973. A Petition for Rehearing

was denied in each cause on the 27th day of February, 1974. These two cases contain substantially identical facts and precisely identical questions of law and were consolidated upon motion made by the Assistant United States Attorney after Briefs were submitted on appeal to the Tenth Circuit Court of Appeals.

OPINION BELOW

The Opinion of the court below is not yet known to be reported, but it is appended hereto in Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review by Writ of Certiorari the order of the United States Court of Appeals is believed to be conferred by 48 U. S. Statutes, 926, and which states, in its pertinent part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods (a) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

More succinctly stated, these questions are:

1. Is the innocent spouse legislation intended to provide retroactive relief to those who qualify for it, or is it to be circumvented by application of the prior law which it modifies?
2. Are the petitioners entitled to an evidentiary hearing (either administrative or judicial) to have their status as an innocent spouse determined, or

may the Internal Revenue Service and the District Court ignore the right to a hearing and decide only an ancillary issue of whether the United States may be restrained from the collection of taxes?

The dispositive question presented for review is whether the January 12, 1971 amendment to the Internal Revenue Code which is commonly referred to as the "Innocent Spouse Act," and which is cited as Public Law 91-679, Sec. 1 (84 Stat. 2063, 26 U.S.C. 6013(e)), actually provides retroactive relief to the innocent spouse of a taxpayer who failed to report fraudulent income or whether that statute is subservient to and controlled by the prior inconsistent statutes which provide only for the recovery of tax after payment under protest. In the case of the Petitioners, the 90-day period for instituting proceedings for a redetermination of the *tax expired prior to the enactment of the statute,* so that this avenue of relief was at no time available to them, just as it would not be available to any such innocent spouse whose 90-day protest period expired on or before January 12, 1971, the date of the enactment of the innocent spouse legislation.

The Petitioners point out for clarification to the Court, that the innocent spouse legislation was made applicable by Congress to all taxable years to which the Internal Revenue Code of 1939 applies, therefore granting relief to all innocent spouses entitled to relief and who have been assessed since the taxable year 1939.

Also presented for review is the question of whether the United States District Courts have jurisdiction to grant

an evidentiary hearing to determine a claimant's entitlement to relief under the above cited statute, or in the alternative, to order an administrative hearing by the Internal Revenue Service at some appropriate level to make such determination; and whether the United States District Courts further have jurisdiction to enjoin and restrain collection efforts pending the finality of such a judicial or administrative determination.

PROVISIONS OF LAW INVOLVED IN THE CASE

The provision of law under which the Petitioners claim a right to relief is Pub. L. 91-679, Sec. 1, 84 Stat. 2063, 26 U.S.C. 6013(e) (Jan. 12, 1971), to-wit:

"§ 6013

"(e) Spouse relieved of liability in certain cases.—

"(1) In general.—Under regulations prescribed by the Secretary or his delegate, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

"(2) Special rules.—For purposes of paragraph (1)—

(A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and

(B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e)(1)(A).

Aug. 16, 1954, c. 736, 68A Stat. 733; Sept. 2, 1958, Pub.L. 85-866, Title I, § 73, 72 Stat. 1660; Dec. 30, 1969, Pub.L. 91-172, Title VIII, § 801(a)(2), (b)(2), 83 Stat. 675; Jan. 12, 1971, Pub.L. 91-679, § 1, 84 Stat. 2063.

Editorial Notes

Pub.L. 91-679, § 3, provided: 'The amendments made by the first two sections of this Act [Sec. 1 added subsec. (e) to sec. 6013] shall apply to all taxable years to which the Internal Revenue Code of 1954 applies. Corresponding provisions shall be deemed to be included in the Internal Revenue Code of 1939 and shall apply to all taxable years to which such Code applies.'

Pub.L. 91-172, § 801, increases the personal exemptions as follows: 1970, '$625' in lieu of '$600' and '$1,250' for '$1,200'; 1971, '$650' for '$625' and '$1,300' for '$1,250'; 1972, '$700' for '$650' and '$1,400' for '$1,300'; 1973 and after, '$750' for '$700' and '$1,500' for '$1,400.'"

The pertinent provision of other applicable statutes which have been cited and relied upon by the parties below

are printed in their full context in Appendix B to this Petition for Writ of Certiorari. The list of all other provisions of law included in said Appendix B is, to-wit:

Section 6013(e), Internal Revenue Code of 1954, as amended by Section 1, Act of January 12, 1971, P.L. 91-679, 84 Stat. 2063.

Section 6212(a), Internal Revenue Code of 1954, as amended by Sec. 89(b) Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606 and Sec. 101(j) (40), Tax Reform Act of 1969, P.L. 91-172, 82 Stat. 487.

Section 6212(c), Internal Revenue Act of 1954, as amended by Sec. 101(f) (2), Tax Reform Act of 1969, supra, and Sec. 102(d) (5), Excise Estate and Gift Tax Adjustment Act of 1970, P.L. 91-614, 84 Stat. 1836.

Section 6213, Internal Revenue Act of 1954, as amended by Sec. 101(j) (42), Tax Reform Act of 1969, supra.

Section 7421, Internal Revenue Act of 1954, as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125.

Section 7422, Internal Revenue Act of 1954, 68A Stat. 876, as amended by P.L. 85-866, 72 Stat. 1662; P.L. 89-713, 80 Stat. 1108; P.L. 91-172, 83 Stat. 525, 532.

Section 7426(a), (b) and (c), as added by Sec. 110(a), Federal Tax Lien Act of 1966, supra.

Senate Report No. 91-1537, 91st Congress, Second Session 4 (1970); United States Code Congressional and Administrative News, 91st Congress, Second Session 1970, page 6089.

STATEMENT OF CASE

The Petitioner, WILMA L. KIRTLEY, is the wife of BUFORD S. KIRTLEY, with whom she resides in Oklahoma City, Oklahoma. Her sole occupation is that of housewife. During their marriage and particularly for the years 1961 through 1965, the Petitioner and Buford S. Kirtley, as husband and wife, filed joint tax returns. On September 27, 1968, the Internal Revenue Service made an assessment affecting both Petitioner and Buford S. Kirtley, in the amount of $129,082.83. This assessment was made for taxes due on money which the Petitioner's husband allegedly embezzled. After enactment of the innocent spouse statute in 1971, the Petitioner, WILMA L. KIRTLEY, requested a hearing to determine whether she was entitled to relief under the innocent spouse act.

The Petitioner, JOSEPHINE SCOTT, is the former spouse of one VERNON DALE SCOTT, from whom she was divorced on or about March 15, 1968. During their former marriage, however, and particularly for the year 1966, the Petitioner and Vernon Dale Scott, as husband and wife, filed joint tax returns. On September 16, 1970, the Internal Revenue Service determined that during the year 1966 Vernon Dale Scott had wrongly appropriated certain monies from the First National Bank of Duncan, Oklahoma, and had received certain payments from the Jo-Don Development Company, none of which was included in the joint income tax return for 1966, and all of which constituted taxable income.

After enactment of the innocent spouse amendment to the Internal Revenue Code Petitioner SCOTT, as did Peti-

tioner KIRTLEY, appealed to the Internal Revenue Service for a hearing to determine whether she was an innocent spouse and entitled to relief under the remedial legislation cited first above.

Neither of the Petitioners was afforded a hearing before the Internal Revenue Service and intense collection efforts were exerted by the IRS against both Petitioners including notice of seizure of all their wages. Suit was commenced by each of the Petitioners in the United States District Court for the Western District of Oklahoma in which each of the Petitioners requested of the District Court that they be afforded a hearing, either judicial or administrative, at some level to have their status as innocent spouses determined and for the restraint of collection efforts pending such a determination.

In each of the District Court cases, further collection efforts by the Internal Revenue Service were temporarily restrained but both cases were later dismissed on findings by the District Courts that they had no jurisdiction to grant any of the relief requested. These dismissals were solely upon the ground that the Courts were without jurisdiction to restrain the collection of taxes, and totally ignored the question of a right to a hearing to determine the Petitioners' status as innocent spouses.

On Appeal to the United States Court of Appeals for the Tenth Circuit, the decision of both District Judges dismissing the cases in the trial court was affirmed, and each of the Petitioners now seeks relief in this Supreme Court.

From the inception of these cases in the District Court, the Petitioners have contended that they are entitled to

both an injunction to restrain the Internal Revenue Service from the collection of the penalty assessments involved, *and* that they are also entitled to a hearing at some level, either administrative or judicial, for a determination as to whether they are entitled to the relief of Section 6013(e) of the Internal Revenue Code of 1954, which grants relief to the innocent spouses of wrongdoers. At no point in the Court of Appeals' opinion, which was rendered on the 6th day of December, 1973, is there even a discussion, much less a determination, as to whether the Petitioners, WILMA L. KIRTLEY and JOSEPHINE SCOTT, or any other person, are now, or ever will be, entitled to the relief which the Congress of the United States intended to grant to them by the passage of Public Law 91-679 and which is codified as Title 26 Section 6013(e) of the United States Code Annotated. In fact, the Court in its opinion does not even recognize the act of Congress as changing the existing law with respect to innocent spouses.

The central and dominant issue in these cases is whether the Petitioners are entitled to the relief provided by Congress under Section 6013(e) (*i.e.*, a hearing to determine their status as innocent spouses); the question of an injunction is secondary inasmuch as the injunction sought only to restrain the collection efforts of the Internal Revenue Service during the time that the Petitioners were attempting to have a determination made as to whether they are innocent spouses. Such a determination is contemplated by the remedial legislation and specifically discussed in the report of the Congressional Committee, which appears in the Senate Report No. 91-1537, 91st Cong. 2d Sess. 4 (1970):

"The third condition requires a factual determination (by the Internal Revenue or the courts) as to whether the spouse seeking relief from liability significantly benefitted, directly or indirectly, from the items omitted from gross income."

This determination is one of the three conditions which must be traversed in a fair determination of the spouses' liability, and the element which has been totally denied by both the Internal Revenue Service and the Courts. THE CONGRESS WHICH ENACTED SECTION 6013(e) ANTICIPATED THAT THE COURTS (AND HOPEFULLY THE INTERNAL REVENUE SERVICE) WOULD ACCORD SPOUSES THE BENEFIT OF A FACTUAL DETERMINATION OF THEIR STATUS AS AN INNOCENT SPOUSE AND RIGHT TO RELIEF. In these cases, however, both the Internal Revenue Service and the Courts, at every stage of the proceedings, have totally circumvented a determination of the Petitioners' right to an evidentiary hearing on their status of innocent spouse by finding that there is no traditional way, under the prior state of the law, to stop the collection process.

The Government attorneys have thoroughly succeeded in convincing the Court of Appeals that the only question on appeal was the question of whether an injunction should be issued to restrain the collection of the tax, and that there was no appeal relative to whether the Appellants are entitled to a hearing to determine whether they are entitled to relief under the above cited Section as innocent spouses. The Appellants have repeatedly requested a hearing to determine their status as innocent spouses at every level of these proceedings, both administrative and judicial. At

every level their pleas have been both denied and ignored. This is an absolute denial of equal protection of the law.

The question of an injunction is moot, and has been since the day the District Court vacated its temporary orders of restraint. From that time to the present there have been no collection efforts during this appeal. During the time of this appeal collection efforts have been voluntarily ceased, thereby making moot all the arguments upon which the government has relied.

The relief which Congress (at the request of Federal Judges) intended to create for innocent spouses, thereby granting them some relief from bearing a penalty incurred by their wrongdoing husbands, has been completely obscured by lower court decisions which have dwelled upon the question of injunctive relief and ignored the question of whether persons claiming to be innocent spouses are entitled to a hearing to determine the merits of their claims.

The 10th Circuit Court of Appeals states on page 4 of its opinion:

> "The exceptions provided in Section 6212(a) and (c) (1) and Section 6213(a) allow injunctions to prohibit assessment of deficiencies, levies, and collection suits unless and until the plaintiff has been sent a notice of deficiency and allowed the statutory time to file a petition for redetermination with the Tax Court. Appellants neither claim nor allege any facts which would place them within these provisions."

THIS STATEMENT HAS THE PROFOUND EFFECT OF TOTALLY OBLITERATING THE RETROACTIVITY OF 6013(e). This result arises by reason of the fact that the

only remedy this Court seems willing to avail an innocent spouse under 6013(e) is the remedy which expired prior to the enactment of 6013(e), *i.e.*, a petition for redetermination within sixty (60) days after the assessment. In other words, HOW COULD AN INNOCENT SPOUSE PROTEST THE TAX UNDER THE SPECIFICATION OF 6212(a) AND (c)(1) AND 6213(a), WHEN CONGRESS HAD NOT YET DECLARED HER AN INNOCENT SPOUSE BY ENACTMENT OF 6013(e). This was the very reason Congress made 6013(e) retroactive, and Appellants' very purpose for requesting a hearing.

The Court of Appeals for the Tenth Circuit states in the last and concluding paragraph of its opinion:

> "Nothing in Section 6013(e) or its legislative history indicates any intent by Congress to create a new exception to Section 7421 or a new procedure for litigating tax questions as the appellants contend. The subject section provides only for a new substantive tax relief element."

With this concluding statement and without any foregoing discussion as to whether the Appellants are entitled to have their status as an innocent spouse determined, the Court closes the door on the rights of the Appellants to claim the benefit of Section 6013(e). In effect, the Court has said the Appellants may be entitled to the relief Congress intended to grant, but there is no way to stop the collection procedures which have already been set into motion by the prior existing statutes, and since Petitioners failed to assert their status as innocent spouses prior to enactment of the innocent spouse statute (*i.e.*, during the

90 days after assessment), they must be denied the possible benefits of the new legislation. In other words, the Court in effect said that regardless of the direction of Congress that the new legislation is retroactive, there is no way it can permit an innocent spouse to retroactively assert protection of the Act. Surely this cannot be permitted.

SUMMARY

The facts are simple:

1. Congress enacted Public Law 6013(e) to afford relief to innocent spouses;
2. Congress directed that the relief would be retroactive to 1939;
3. These petitioners claim to be innocent spouses;
4. They are entitled to be heard, at some level, either judicially or administratively, on their claim;
5. The District Court and the Court of Appeals have denied the Petitioners the right to be heard on their claim;
6. Such a denial is in violation of the Act itself and further in violation of their constitutional rights to due process of law and to the equal protection of the law.

This Court should, therefore, grant certiorari to review the questions and grant to these Petitioners their right to be heard on their claim as innocent spouses—as provided by Section 6013(e) of the Internal Revenue Code of 1954, as amended by P.L. 91-679.

Respectfully submitted,

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April, 1974

APPENDIX A

Decision of the United States Court of Appeals, Tenth Circuit.

Entered and Filed on the 6th day of December, 1973.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

November Term, 1973

FILED
DEC 6 1973
HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

WILMA L. KIRTLEY, Appellant, v. CLYDE L. BICKERSTAFF, District Director of Internal Revenue, and THE UNITED STATES OF AMERICA, Appellees.	)	No. 73-1203 (71-781)
JOSEPHINE SCOTT, Appellant, v. WILLIAM H. THOMPKINS, Acting District Director of Internal Revenue, and THE UNITED STATES OF AMERICA, Appellees.	)	No. 73-1204 (71-596)

[APPENDIX]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

John C. Moran, Oklahoma City, Oklahoma (Riley Brock, Oklahoma City, Oklahoma with him on the brief) for Appellants.

Bennet N. Hollander, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Ernest J. Brown and Daniel F. Ross, Attorneys, Department of Justice; and William R. Burkett, United States Attorney, and Givens L. Adams, Assistant United States Attorney, Of Counsel, with him on the brief) for Appellees.

Before LEWIS, Chief Judge; BARRETT, Circuit Judge; and TALBOT SMITH,* District Judge.

LEWIS, Chief Judge.

The dispositive issue in these consolidated appeals is whether original jurisdiction lies in the district courts to grant injunctive relief to claimants seeking to restrain the assessment or collection of taxes under allegation that they are "innocent spouses" within the scope of 26 U.S.C. § 6013(e).[1] Each appellant alleges that she is an "innocent

* For the Eastern District of Michigan, sitting by designation.

[1] (e) Spouse Relieved of Liability in Certain Cases.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

spouse," victimized by an embezzling husband, and entitled to relief by virtue of the cited statute. No specific administrative determination has been made of whether appellants are or are not "innocent spouses" and each now seeks a judicial determination of that issue as a premise for the granting of injunctive relief. The trial court in each case dismissed the actions for lack of jurisdiction, holding, in effect, that § 6013(e) provides no specific grant of special jurisdiction to the courts and that appellants' relief is limited to Tax Court procedure or to district court action for refund after payment.

We affirm. Jurisdiction to restrain the assessment or collection of taxes is denied to the courts under the mandate of § 7421 which provides in pertinent part:

> (a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person whether or not such person is the person against whom such tax was assessed.

The prohibition of § 7421 is broad, Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, and judicial intervention is not allowable simply upon claim of potential hard-

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[1] (Continued)

> (B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and
>
> (C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,
>
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

ship, "wrongfulness," or difficulties encountered in procedures other than injunctive relief. We must, therefore, reject appellants' arguments that it is the court's duty to assume jurisdiction because of the claim that appellants are, in fact, "innocent spouses" and are not getting the relief that Congress intended for such persons. The court can grant injunctive relief if, and only if, a legislative or judicial exception to § 7421 exists.

None of the legislative exceptions to § 7421 establishes grounds for jurisdiction in these cases. The exceptions provided in § 6212(a) and (c)(1) and § 6213(a) allow injunctions to prohibit assessment of deficiencies, levies, and collection suits unless and until the plaintiff has been sent a notice of deficiency and allowed the statutory time to file a petition for redetermination with the Tax Court. Appellants neither claim nor allege any facts which would place them within these provisions.

The exceptions provided in § 7426(a) and (b)(1) do not allow jurisdiction to be exercised here since the section applies only to wrongful levies and does not allow litigation of the assessment itself. In fact, § 7426(c) expressly bars actions concerning the validity of an assessment. Appellants contend only that the levy is wrongful and not that it is defective itself as is required by the statute. Further, the section is available only to persons "other than the person against whom is assessed the tax out of which such levy arose." Here appellants are the persons against whom the tax is assessed; accordingly, the exception does not exist. Nor can appellants properly assert that they are not taxpayers by the expedient of boot strapping their yet unestablished claim to be "innocent spouses" as a jurisdictional basis for a judicial determination of fact perhaps leading to an adjudication that they should not be considered taxpayers. As this court has previously held:

> The assessment of the tax is, of course, presumptively correct and in order to establish federal court

jurisdiction for injunctive relief, more is required than bare allegations of illegality, even though such allegations may ultimately be sustained. Williams v. Wiseman, 10 Cir., 333 F_2 810, 811.

Appellants' contentions fall under the category of "bare allegations of illegality" and, therefore, do not come within the judicial exception to § 7421(a).

Nothing in § 6013(e) or its legislative history indicates any intent by Congress to create a new exception to § 7421 or a new procedure for litigating tax questions as the appellants contend. The subject section provides only for a new substantive tax relief element.

APPENDIX B

Section 6013(e) Internal Revenue Act of 1954:

(e) Spouse relieved of liability in certain cases.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it

is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

(2) Special rules.—For purposes of paragraph (1)—

(A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and

(B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e) (1) (A).

Aug. 16, 1954, c. 736, 68A Stat. 733; Sept. 2, 1958, Pub. L. 85—866, Title I, § 73, 72 Stat. 1660; Dec. 30, 1969, Pub.L. 91—172, Title VIII, § 801(a) (2), (b) (2), 83 Stat. 675; Jan. 12, 1971, Pub.L. 91—679, § 1, 84 Stat. 2063.

Editorial Notes

Pub.L. 91—679, § 3, provided: "The amendments made by the first two sections of this Act [Sec. 1 added subsec. (e) to sec. 6013] shall apply to all taxable years to which the Internal Revenue Code of 1954 applies. Corresponding provisions shall be deemed to be included in the Internal Revenue Code of 1939 and shall apply to all taxable years to which such Code applies."

Pub.L. 91—172, § 801, increases the personal exemptions as follows: 1970, "$625" in lieu of "$600" and "$1,250" for "$1,200"; 1971, "$650" for "$625" and "$1,300" for "$1,250"; 1972, "$700" for "$650" and "$1,400" for "$1,300"; 1973 and after, "$750" for "$700" and "$1,500" for "$1,400".

Section 6212(a), Internal Revenue Act of 1954:

§ 6212. Notice of deficiency

(a) In general.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Section 6212(c), Internal Revenue Act of 1954:

(c) Further deficiency letters restricted.—

(1) General rule.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b) (1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross references.—

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of election with respect to the standard deduction where tax-

payer and his spouse made separate returns, see section 144(b).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a) (3) (C) and (D).

(C) Deficiency attributable to gain on sale or exchange of personal residence, see section 1034(j).

(D) Deficiency attributable to war loss recoveries where prior benefit rule is elected, see section 1335.

Aug. 16, 1954, c. 736, 68A Stat. 770; Sept. 2, 1958, Pub. L. 85—866, Title I, §§ 76, 89(b), 72 Stat. 1661, 1665; Feb. 26, 1964, Pub.L. 88—272, Title I, § 112(d) (1), 78 Stat. 24; Dec. 30, 1969, Pub.L. 91—172, Title I, § 101 (f) (2), (j) (40), (41), 83 Stat. 524, 530; Dec. 31, 1970, Pub.L. 91—614, Title I, § 102(d) (5), 84 Stat. 1842.

Section 6213(a) Internal Revenue Act of 1954:

§ 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition

has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Aug. 16, 1954, c. 736, 68A Stat. 771; June 21, 1965, Pub. L. 89-44, Title VIII, § 809(d) (4) (B), 79 Stat. 168; Dec. 30, 1969, Pub.L. 91-172, Title I, § 101(f) (3), (j) (42), 83 Stat. 524, 530.

Section 7421, Internal Revenue Act of 1954:

§ 7421. Prohibition of suits to restrain assessment of collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

Aug. 16, 1954, c. 736, 68A Stat. 876; Nov. 2, 1966, Pub. L. 89—719, Title I, § 110(c), 80 Stat. 1144.

Section 7422(a) Internal Revenue Act of 1954:

§ 7422. Civil actions for refund

(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

Aug. 16, 1954, c. 736, 68A Stat. 876; Sept. 2, 1958, Pub. L. 85—866, Title I, § 78, 72 Stat. 1662; Nov. 2, 1966, Pub.L. 89—713, § 3(a), 80 Stat. 1108; Dec. 30, 1969, Pub.L. 91—172, Title I, § 101(i), (j) (56), 83 Stat. 525, 532.

Section 7426(a), (b) and (c), Internal Revenue Act of 1954:

§ 7426. Civil actions by persons other than taxpayers

(a) Actions permitted.—

(1) Wrongful levy.—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

(2) Surplus proceeds.—If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds.—If property has been sold pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United S. s in a district court of the United States.

(b) Adjudication.—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property.—If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

* * * * * *

(c) Validity of assessment.—For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

* * * * * *

Added Pub.L. 89—719, Title I, § 110(a), Nov. 2, 1966, 80 Stat. 1142.

Senate Report No. 91—1537, 91st Congress Second Session (1970); United States Code Congressional and Administrative News, 91st Congress—Second Session 1970, page 6089:

JOINT RETURN—INCOME TAX LIABILITY

P.L. 91—679, see page 2408

House Report (Ways and Means Committee) No. 91—1734, Dec. 14, 1970 [To accompany H.R. 19774]

Senate Report (Finance Committee) No. 91—1537, Dec. 30, 1970 [To accompany H.R. 19774]

Cong. Record Vol. 116 (1970)

DATES OF CONSIDERATION AND PASSAGE

House December 22, 1970

Senate December 31, 1970

The Senate Report is set out.

SENATE REPORT NO. 91—1537

THE Committee on Finance, to which was referred the bill (H.R. 19774) to amend the Internal Revenue Code of 1954 to provide that in certain cases a spouse will be relieved of liability arising from a joint income tax return, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

LEGISLATIVE HISTORY
P.L. 91—679

I. SUMMARY

The committee's bill, H.R. 19774, provides relief for the situations which have been brought to the attention of the committee in connection with the imposition upon innocent spouses of large liabilities for taxes and penalties attributable to income omitted from a joint return by the other spouse. In several situations, under existing law, the Internal Revenue Service has been successful in assessing income tax liabilities and penalties (attributable to an omis-

sion from income) against a spouse wholly innocent of any wrongdoing insofar as the omission is concerned. This bill provides, that where certain conditions exist, the "other spouse" is to be relieved of tax liability to the extent that the liability is attributable to an omission from gross income. The bill also affords relief from the imposition of the 50-percent fraud penalty where the underpayment in tax is not attributable to the fraud of the spouse.

The Treasury Department has indicated that it does not oppose the enactment of this bill.

II. REASONS FOR THE BILL

Under existing law individuals filing a joint income tax return are jointly and severally liable for any tax liability found to be due. Joint and several liability also exists with respect to penalties and additions to tax: e. g., the 50-percent fraud penalty determined to be due as a result of the fraud of either spouse. Since a joint return does not show the respective incomes and deductions of the husband and wife, individually, and since the statute imposes a single tax upon the aggregate income, administrative simplicity makes it necessary that the filing of such a return create a liability that is joint and several.

Numerous cases have arisen in which the imposition of joint liability upon an innocent spouse has resulted in the committee's opinion, in grave injustice. A typical situation is one in which a husband embezzles funds (which are taxable income), and omits the proceeds from gross income. Because of the fact that the wife of the embezzler filed a joint return with her husband for the year in which the income should have been reported, the Internal Revenue Service may, under existing law, hold the innocent spouse liable for the tax liability resulting from the underpayment and for the 50 percent fraud penalty due as a result of the fraudulent omission from income. This liability may be imposed upon the spouse even though she had no knowledge

of her husband's activities and the resulting omission from income, and even though she did not benefit in any way from the use of the funds. Several cases of this type have involved situations in which the innocent spouse has been deserted by her husband and the funds gained by embezzlement or theft have been squandered and spent by the wrongdoer.

Several of the instances in which joint liability has been asserted by the Internal Revenue Service have resulted in decided court cases. Although the courts in these situations have expressed sympathy for the innocent spouse, they have stated that the clear rule of the statute, imposing joint and several liability, did not permit any decision other than one holding the innocent spouse liable for the taxes and penalties. Some of these judicial decisions have carried pleas for legislative relief. For example, Judge Hoyt stated in *Louise M. Scudder,* 48 T.C. 36, 41 (1967):

> Although we have much sympathy for petitioner's unhappy situation and are appalled at the harshness of this result in the instant case, the inflexible statute leaves no room for amelioration. It would seem that only remedial legislation can soften the impact of the rule of strict individual liability for income taxes on the many married women who are unknowingly subjected to its provisions by filing joint returns. * * *

This proposal seeks to correct the unfairness in the situations brought to the attention of this committee and to bring government tax collection practices into accord with basic principles of equity and fairness.

III. GENERAL EXPLANATION

This bill deals with the problems outlined above by adding two provisions to the tax statutes. First, the bill provides that when three conditions exist, the "innocent spouse" is to be relieved of the tax liability to the extent

that such liability is attributable to an omission from gross income. Second, the bill provides that the 50-percent fraud penalty is not to apply to a spouse unless some part of the underpayment on the joint return is due to the fraud of that spouse.

The first section of the bill provides that an innocent spouse is to be relieved of liability for tax, including interest, penalties, and other amounts, where three conditions exist: (1) a joint return has been filed and the omission from gross income (attributable to one spouse) amounts to more than 25 percent of the total gross income stated on the return; (2) the innocent spouse establishes that in signing the return he or she did not know of, and had no reason to know of, the omission from income, and; (3) taking into account whether or not the spouse significantly benefited from the items omitted from gross income and all other facts and circumstances, it is inequitable to hold the spouse in question liable for the deficiency in tax. This provision has applicability to an omission from gross income for any reason and is not limited to embezzlement, theft or similar activities.

The first requirement, that the amount omitted from gross income must equal more than 25 percent of the gross income shown on the return, is intended to limit the relief provided in the bill to those cases where the income omitted represents a significant amount relative to the reported income. Whether or not an omission meets this test is to be determined in a manner similar to the test applied under existing law in determining, for purposes of the 6-year statute of limitations, when an omission in excess of 25 percent of gross income exists.

The second condition imposes on the innocent spouse the burden of showing that he or she did not know of, and had no reason to know of, the omission from income. It is intended that the spouse, in such a situation, will have the

usual burden of proof (preponderance of the evidence) on this issue and not the higher burden required of the Government in civil fraud cases.

The third condition requires a factual determination (by the Internal Revenue or the courts) as to whether the spouse seeking relief from liability significantly benefited, directly or indirectly, from the items omitted from gross income. It is not intended that the term "benefit" as used here include ordinary support of the innocent spouse. Unusual support or transfers of property to the spouse would, however, constitute "benefit" and should be taken into consideration in determining whether the spouse benefited from the items omitted from gross income. Such "benefit" may be received by the spouse several years after the year in which the omitted item should have been included in gross income. For example, if a spouse receives an inheritance of property or life insurance proceeds, and such receipt is traceable to items omitted from gross income by the other spouse in earlier years, that spouse will be considered to have benefited from those items. A mere finding that the spouse "benefited" from the items omitted from gross income will not be sufficient however, to prevent that spouse from obtaining relief from liability for the tax. For the spouse to be prevented from obtaining relief there must also be a finding that the benefit was "significant" and that "taking into account all other facts and circumstances," it is not "inequitable to hold the * * * spouse liable for the deficiency in tax * * *"

Other factors which could also be taken into account, in appropriate situations, in determining whether it is inequitable to hold the spouse liable for the deficiency include the fact of whether the spouse in question is deserted or is divorced or separated.

The bill provides that the determination of the spouse to whom items of gross income, other than gross income

from property, are attributable is to be made without regard to community property laws. Thus, the rules of community property are not followed with respect to earned income or income from theft or embezzlement. Income earned by a husband, for example, and omitted from a joint return, is to be attributed to the husband, even though it may constitute community property, in determining whether the wife is entitled to relief from the tax liability under this provision. On the other hand, income from property, such as rental income from an apartment house owned by the marital community (with neither spouse rendering substantial services in producing the rental income) is to be deemed the income of both spouses. Since income of this latter type is not "attributable to one spouse," a spouse would not be entitled to relief from any tax liability attributable to its omission from gross income.

The bill (sec. 2) also amends the provision imposing a 50-percent penalty when the underpayment is due to fraud (sec. 6653(b) of the code). In this case, the bill provides, in effect, that if one spouse is shown to be guilty of fraud in the filing of a joint return, the other spouse is not to be liable for the fraud penalty unless it is also established that he or she is also guilty of fraud. This potential relief from the fraud penalty applies even though the spouse in question may be jointly liable for the underpayment in tax due. This relief would apply, for example, where the underpayment resulted from fraudulent deductions (rather than on omission from gross income)—an example of a situation in which no relief is provided the spouse for the tax liability as such.

If a spouse is to be subject to the 50-percent fraud penalty as a result of the filing of a joint return, the Government must establish that some part of the underpayment is due to the fraud of that spouse in accordance with the burden of proof requirements imposed upon it by existing law. Thus, if the husband is convicted of the crime of tax eva-

sion, and consequently collaterally estopped from denying that the joint return that he filed with his wife is false and fraudulent, the Government still must show that the wife is also guilty of fraud if it seeks to make her liable for the 50-percent fraud penalty.

The bill does not alter the rules with respect to the statute of limitations. If the Government establishes that an omission of gross income from a joint return is due to the fraud of one spouse, the tax liability due as a result of the underpayment may be assessed at any time. The other spouse may be held liable for that underpayment unless he or she is eligible for relief from such liability under the first provision of the bill. However, the other spouse is not, in any event, to be liable for the 50-percent fraud penalty asserted as a result of the underpayment unless the Government establishes that some part of that underpayment is due to the fraud of that spouse.

The amendments made by this bill are to apply to all taxable years to which the Internal Revenue Code of 1954 applies and corresponding provisions are to be deemed included in the Internal Revenue Code of 1939 and are to apply to all taxable years to which that code applies. The bill, of course, does not open a year which has been closed by the statute of limitations, res judicata, or otherwise.

APPENDIX C

JANUARY TERM — FEBRUARY 1, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable James E. Barrett, Circuit Judge, and Honorable Talbot Smith, Senior District Judge*

(* Of the Eastern District of Michigan.)

WILMA L. KIRTLEY, Plaintiff-Appellant, v. CLYDE L. BICKERSTAFF, District Director of Internal Revenue, and THE UNITED STATES OF AMERICA, by serving William R. Burkett, U. S. Federal District Attorney, Defendants-Appellees.	)	No. 73-1203
JOSEPHINE SCOTT, Plaintiff-Appellant, v. WILLIAM H. THOMPKINS, Acting District Director of Internal Revenue Service, and THE UNITED STATES OF AMERICA, Defendants-Appellees.	)	No. 72-1204

This matter comes on for consideration of the petition for rehearing filed by the appellants in the above cases.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS,
Clerk

s/ By: (signature illegible)
Deputy Clerk